No. 09-199

IN THE
Supreme Court of the United States

MICHAEL HALLIWELL & JAMES PARKER,

Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SONOMA,

Respondent,

CHRYSANTHE PAXINOS,

Real Party in Interest

On Petition for a Writ of Certiorari
To the California Supreme Court

PETITION FOR REHEARING

Michael J. Halliwell & James F. Parker
Defendants in Propria Persona
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November 6, 2009

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PETITION FOR REHEARING. 1

1. Once again OEX proceedings at a crossroads . 1

2. Enforcement of judgments before finality 5

3. Federal consideration of federal claims 11

Certificate re Grounds for Rehearing. 19

TABLE OF AUTHORITIES CITED

CASES

Brinkerhoff-Faris Trust & Savings Co. v Hill (1930) 281 U.S. 673, 681 11

Brown v Allen (1953) 344 U.S. 443, 456 12

Bulloch v. United States (1983) 721 F.2d 713, 719 . 6

Chambers v NASCO, Inc. (1991) 501 U.S. 32, 53. . . 6

Cooper v Aaron (1958) 358 U.S. 1, 19-20 4

England v Louisiana State Board of Medical Examiners (1964) 375 U.S. 411, 415, 417. . . . . 13, 14

Flynn v United States (1955) 348 U.S. 900. 10

Ford v Wainwright (1986) 477 U.S. 399, 430 18

Glasser v United States (1942) 315 U.S. 60, 70 . . . 17

Grannis v. Ordean (1914) 234 U.S. 385, 394 18

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co. (1916) 240 U.S. 251, 258 13

Hanover Insurance Co. v United States (1989) 880 F.2d 1503, 1505, 1506-1507, 1508. . . . . 8, 9

Hazel-Atlas Glass Co. v Hartford Empire Co. (1944) 322 U.S. 238, 239-240, 246, 247, 251-252. . . . . 6, 7, 8

House v. Mayo (1953) 324 U.S. 42, 48. 13

Kenner v. Commissioner of Internal Revenue (1968) 387 F.2d 689, 691 9

Kowis v. Howard (1992) 3 Cal 4th 888, 897. 12

N.A.A.C.P. v Button (1963) 371 U.S. 415, 427 14

Plaut v Spendthrift Farm, Inc. (1995) 514 U.S. 211, 227. 10

Rose v Mitchell (1979) 443 U.S. 545, 592 17

Shelley v Kraemer (1948) 334 U.S. 1, 20 4

Simpson & Co. v Commissioner of Internal Revenue (1944) 321U.S. 225, 230. . . . . 9, 10

Sweet v. Commissioner of Internal Revenue (1941) 120 F.2d 77, 80, 81. . . . . 9, 10

Toscano v. Commissioner (1971) 441 F.2d 930, 933 9

Townsend v Sain (1963) 372 U.S. 293, 312-319, 313, 313-314, 314, 316, 319 . . . . . 15, 16, 17

Wheat v United States (1988) 486 U.S. 153, 162. . 17

Willcox v. Consolidated Gas Co. (1909) 212 U.S. 19, 40. 14

UNITED STATES CONSTITUTION

Bill of Rights. 4

STATE STATUTES

California Code of Civil Procedure § 916(a) 1, 5

California Code of Civil Procedure § 917.1(d). 5

FEDERAL RULES OF CIVIL PROCEDURE

Rule 60(b). 6

UNITED STATES SUPREME COURT RULES

Rule 44 . . . . . 2, 9, 18

WEBSITE INFORMATION

Inquiry #177(2/10/06) re Judge Elaine Rushing. . . . 2

09-199 CERTIORARI REHEARING PETITION

1. Once again OEX proceedings at a crossroads

On July 7, 2009 Judge Rushing turned over to Plaintiff's counsel, James Parker's $833 (from his part-time monthly paycheck of $350, plus $483 in unemployment benefits) which had accumulated in Parker's bank account, since Judge Rushing's off-the-record turnover of $10,118 from this account (on November 26, 2007, in defiance of the automatic stay while an appeal is pending of CCP § 916(a), before there had been ANY appellate review). James Parker protested to Judge Rushing: "Judge Boyd in OEX hearings stayed those hearings as premature because he agrees federal appeals are relevant." (July 7, 2009 Transcript at 11:27 to 12:1) Judge Rushing replied: "I believe he is wrong. I just have to say it. This is before me now. Each Judge has to

decide for themselves, and so I'm ruling against you on that point." (Ibid at 12:2-4)

Judge Robert S. Boyd would like to simply do his own job of enforcing judgments which other judges have made, without addressing the bitter legacy of a judge (the Honorable Elaine Rushing) who has been censured by California's Commission on Judicial Performance (Inquiry #177) for dishonesty, admitted favoritism in her courtroom, and seeking favored treatment for herself because her husband is a Justice of California's Court of Appeal. Once again Judge Boyd (after doing so in his Orders of July 23, 2008, January 20, 2009 and April 17, 2009) has gone to the brink and pulled back. On October 20, 2009 Judge Boyd cancelled a three-day jail sentence he had imposed on James Parker (for refusing to give up on his Supreme Court appeals, before seeking a Rehearing under Rule 44). Judge Boyd's Order of

October 20, 2009 once more "kicks the can down the road" and states:

> The court on its own motion, hereby stays the enforcement of the order of contempt announced at the hearing on the above matter held on October 19, 2009, and orders this matter to be re-scheduled for hearing on November 23, 2009 at 8:15 a.m. in Courtroom 17.

Judge Boyd is a former Presiding Judge of Sonoma County Superior Court, and he is acutely aware of his colleagues' need to renew their mandate with the voters every six years. Defendants would like their case to be decided on the merits (instead of having embarrassing aspects swept under the rug to protect Judge Rushing, whose current term expires in 2010). The United States Supreme Court faces a similar dilemma. It surely realizes that there are enough dishonest state judges willing to trample on federal constitutional rights, that it would have time to do very little else, if it constituted itself as a court

of last resort to safeguard judicial integrity. On the other hand, the High Court would like to keep faith with its proclamation in *Cooper v Aaron* (1958) 358 U.S. 1, 19-20, which concludes by affirming: "Our constitutional ideal of equal justice under law is thus made a living truth."

It is obvious why evicted tenants seeking to ultimately vindicate their invocation of the Bill of Rights (their right to be informed of the charges against them and to confront their accusers) would want to transfer their case to Federal District Court to seek enforcement of *Shelley v Kraemer* (1948) 334 U.S. 1, 20, with respect to Covenants, Conditions and Restrictions (CC & R's) which deny tenants a right to confront their accusers, in Homeowners Association CC & R enforcement proceedings:

> The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied

> rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

It is not at all obvious why the Supreme Court would wish to make its difficult choice in this case, without the benefit of the reliable factual record, which it can easily secure by means of a remand to Federal District Court.

2. Enforcement of judgments before finality

Prompt transcript availability (often on the same day as a hearing) for Judge Boyd's judgment enforcement hearings has played a key role in his backing away from premature enforcement (contrary to CCP § 916(a) and 917.1(d)) of judgments which consist entirely of attorney fees and other costs. However, Judge Boyd refused to even allow briefing on the obstruction of justice charges re other courts which are the main focus of the disputed fees motion (see October 5, 2009 Transcript at 13-14).

Nothing a court tried to do to uphold the rule of law would be effective, if it did not have the power to protect the integrity of its own process.

Bulloch v. United States (1983) 721 F.2d 713, 719 discusses considerations relating to rectifying fraud:

> As to actions for relief from fraud on the court it is generally held that the doctrine of laches as such does not apply, but unexplained delays bear on the basic concept of the finality of judgments and the proof. Rule 60(b) does not impose a time limit on motions asserting fraud on the court.

Chambers v NASCO, Inc. (1991) 501 U.S. 32, 53 discusses the scope of sanctions for attempting to defraud the court, noting that "the imposition of sanctions under the bad-faith exception depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation."

Hazel-Atlas Glass Company v. Hartford Empire Company (1944) 322 U.S. 238, 246 observes:

> The public welfare demands that the agencies of public justice be not so impotent that they must

> always be mute and helpless victims of deception and fraud.

Hazel-Atlas Glass Company v. Hartford Empire Company (1944) 322 U.S. 238, 239-240 observes:

> After a hearing the Circuit Court concluded that, since the alleged fraud had been practiced on it rather than the District Court, it would pass on the issues of fraud itself instead of sending the case to the District Court.

Concealing the authorship by Plaintiff's counsel (Charles Jensen) of the hearsay complaints (with names redacted) compiled by "a neighbor" and submitted to the jury over our strenuous efforts to exclude this Exhibit (#5), is no less fraudulent than the article used to mislead the courts in *Hazel-Atlas*, *supra*.

Hazel-Atlas Glass Company v. Hartford Empire Company (1944) 322 U.S. 238, 247 observes:

> Having lost their infringement suit based on the patent in the District Court wherein they did not specifically emphasize the article, they urged the article upon the Circuit Court and prevailed.

> They are in no position now to dispute its effectiveness. Neither should they now be permitted to escape the consequences of Hartford's deceptive attribution of authorship to Clarke on the ground that what the article stated was true. Truth needs no disguise. The article, even if true, should have stood or fallen under the only title it could honestly have been given – that of a brief in behalf of Hartford, prepared by Hartford's agents, attorneys, and collaborators.

In *Hazel-Atlas Glass Company v. Hartford Empire Company* (1944) 322 U.S. 238, 251-252, Justice Roberts observes in his concurring opinion:

> No fraud is more odious than an attempt to subvert the administration of justice. The court is unanimous in condemning the transaction disclosed by this record. Our problem is how best the wrong should be righted and the wrongdoers pursued. Respect for orderly methods of procedure is especially important in a case of this sort.

So long as the victims of fraud on the court move promptly to seek redress, normal rules of finality do not apply. *Hanover Insurance Co. v United States* (1989) 880 F.2d 1503, 1505, defines finality as "when the courts no longer possess power to reopen the

matter." But *Hanover* continues (880 F.2d at 1508, Footnote 3):

> The rule, of course, applies to legitimate decisions; the cases agree that in those rare instances where fraud on the court has been practiced, the judicial function itself has been undermined and the decision must be reopened to cleanse the process. See, e.g., Toscano v. Commissioner (1971) 441 F.2d 930, 933; Kenner v. Commissioner of Internal Revenue (1968) 387 F.2d 689, 691; Sweet v. Commissioner of Internal Revenue (1941) 120 F.2d 77, 81.

Every one of the nine prior Order of Examination (OEX) hearings, which Judge Boyd eventually ruled had been premature, were instigated by Plaintiff's counsel to try to disrupt Defendants' ongoing appeals (and this was no less true of his October 19, 2009 effort to ignore Supreme Court Rule 44.1).

Hanover Insurance Co. v United States (1989) 880 F.2d 1503, 1506-1507 observes:

> The lesson of *Simpson & Co. v Commissioner of Internal Revenue* (1944) 321U.S. 225, 230 is that the Court's jurisdiction is preserved for the period specified in its rules. . . .

> [In *Sweet v. Commissioner of Internal Revenue* (1941) 120 F.2d 77, 80] Judge Magruder foreshadowed what we might now call a Simpsonesque interpretation: "final" for this purpose may refer not to the date of denial of certiorari (notwithstanding use of the term), but "perhaps [depends] upon the lapse of twenty-five days, ... during which period, under the rules of the Supreme Court, the petitioners might have asked for a rehearing." In our judgment, *Simpson & Co. v Commissioner of Internal Revenue* (1944) 321 U.S. 225, 229-230 conclusively proved the accuracy of the *Sweet* augury. . . . . The Court plainly foretold the outcome of our inquiry by declaring that the statutory finality provisions must be read in conjunction with the rule as to rehearings. . . . . [Thus,] "the denial of a petition for certiorari should not be treated as a definitive determination" in the Supreme Court until the period for filing a rehearing petition has expired [*Flynn v United States* (1955) 348 U.S. at 900].

The focus of the October 19, 2009 OEX hearing was Charles Jensen's attempt to ignore Supreme Court Rule 44, and enforce judgments which were not final (even if one does not consider the file tampering and other fraud by which they were secured). *Plaut v Spendthrift Farm, Inc.* (1995) 514 U.S. 211, 227 notes:

> Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole.

There is no doubt that where claims arise under the Due Process and Equal Protection Clauses of the Fourteenth Amendment (as is undisputed in *Paxinos v Halliwell & Parker*) *Brinkerhoff-Faris Trust & Savings Co. v Hill* (1930) 281 U.S. 673, 681 is controlling: "it may be observed that the plaintiff's claim is one arising under the federal Constitution and, consequently, one on which the opinion of the state court is not final."

3. Federal consideration of federal claims

Judge Rushing was not willing to wait for the discretionary review process to run its course in state court, before piling another $19,000 in attorney fees on top of her previous ($30,000-plus) awards which James Parker was appealing. On February

10, 2009, Judge Rushing ruled: "I actually differ from Judge Boyd in my view of the case. This is a limited- [supposedly to $25,000] jurisdiction case. And that means the appeal rights extend to the Appellate Division of the Superior Court." (Transcript at 7:21-24) When the California Supreme Court did complete its process of discretionary review by denying Defendants' petitions, Charles Jensen argued that these denials were rulings on the merits of the claims Defendants have been struggling to have adjudicated. In fact, the California Supreme Court does not have time to consider all the claims which may be meritorious, and it has made it clear (*Kowis v. Howard* (1992) 3 Cal 4th 888, 897) that summary denial of a writ petition is not a decision on the merits.

The policy of the U.S. Supreme Court is very similar. In *Brown v Allen* (1953) 344 U.S. 443, 456,

Justice Frankfurter (stating the majority position of the Court on this point, as the syllabus says) notes:

> We have frequently said that the denial of certiorari "imports no expression of opinion upon the merits of a case." House v. Mayo (1953) 324 U.S. 42, 48; Hamilton-Brown Shoe Co. v. Wolf Bros. & Co. (1916) 240 U.S. 251, 258: ["As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision."]

Since a ruling of general applicability is always the objective of the granting of certiorari, a properly developed factual record is an essential prerequisite.

England v Louisiana State Board of Medical Examiners (1964) 375 U.S. 411, 415, protects all litigants from being denied federal protection of their Due Process rights, without their consent, saying:

> Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred special categories of jurisdiction upon the federal courts, and with the principle that "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take

> such jurisdiction." Willcox v. Consolidated Gas Co. (1909) 212 U.S. 19, 40.

England v Louisiana State Board of Medical Examiners (1964) 375 U.S. 411, 417, observes that (where there is not a need for an authoritative state court construction of an ambiguous statute) a party has a right to access to Federal District court for a final determination of his claim. (*NAACP v Button* (1963) 317 U. S. 415, 427). *England, supra*, affirms:

> The possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts.

England v Louisiana State Board of Medical Examiners (1964) 375 U.S. 411, 417, notes that in cases where a defendant does not initiate litigation, a primary fact determination by a District Court is still a defendant's right. This is so even where fact findings on federal constitutional contentions are

made by a state tribunal in the first instance. (See *Townsend v Sain* (1963) 372 U.S. 293, 312-319.) Defendants seek to use their right to fact finding in federal court to bring the record up to the standards in *Townsend v Sain*, cited by the Court in *England*, *supra*.) *Townsend v Sain* (1963) 372 U.S. 293, 313-314 held:

> There cannot even be the semblance of a full and fair hearing unless the state court actually reached and decided the issues of fact tendered by the defendant. Thus, if no express findings of fact have been made by the state court, the District Court must initially determine whether the state court has impliedly found material facts.

Townsend v Sain (1963) 372 U.S. 293, 314 held:

> Reconstruction is not possible if it is unclear whether the state finder applied correct constitutional standards in disposing of the claim. Under such circumstances the District Court cannot ascertain whether the state court found the law or the facts adversely to the petitioner's contentions. Since the decision of the state trier of fact may rest upon an error of law rather than an adverse determination of the

facts, a hearing is compelled to ascertain the facts.

Townsend v Sain (1963) 372 U.S. 293, 316 held:

This Court has consistently held that state factual determinations not fairly supported by the record cannot be conclusive of federal rights.

Townsend v Sain (1963) 372 U.S. 293, 316 held:

Even if all the relevant facts were presented in the state-court hearing, it may be that the fact-finding procedure there employed was not adequate for reaching reasonably correct results.

Townsend v Sain (1963) 372 U.S. 293, 316 held:

Even where the procedure employed does not violate the Constitution, if it appears to be seriously inadequate for the ascertainment of the truth, it is the federal judge's duty to disregard the state findings and take evidence anew.

Townsend v Sain (1963) 372 U.S. 293, 316 held:

Our present concern is with errors which, although less serious, are nevertheless grave enough to deprive the state evidentiary hearing of its adequacy as a means of finally determining facts upon which constitutional rights depend.

Townsend v Sain (1963) 372 U.S. 293, 319 held:

> Of course, if because no record can be obtained the district judge has no way of determining whether a full and fair hearing which resulted in findings of relevant fact was vouchsafed, he must hold one.

Justice White's opinion in *Rose v Mitchell* (1979) 443 U.S. 545, 592, does not agree with the Court's opinion, that discriminatory selection of a non-voting grand jury foreman is not sufficiently relevant to invalidate an indictment, but no justice disagrees with his citation of *Townsend v Sain* (1963) 372 U.S. 293, 313, as the appropriate standard, whereby "[an] evidentiary hearing must be held 'unless the state-court trier of fact has after a full hearing reliably found the relevant facts.'"

Wheat v United States (1988) 486 U.S. 153, 162 quotes with approval this holding of *Glasser v United States* (1942) 315 U.S. 60, 70: "To preserve the protection of the Bill of Rights for hard-pressed

defendants, we indulge every reasonable presumption against the waiver of fundamental rights."

In a case triggering a wide ranging discussion of Due Process requirements, six justices agree with Justice O'Connor's least demanding standard in *Ford v Wainwright* (1986) 477 U.S. 399, 430 notes: "If there is one 'fundamental requisite' of due process, it is that an individual is entitled to an 'opportunity to be heard.' Grannis v. Ordean, 234 U.S. 385, 394 (1914)."

Under Rule 44.3, this Court can ask for citation of a ruling by any judge, which addresses any legal or factual aspect of the disputed attorney fees awards. There has been no such ruling; when this is confirmed, Defendants' right to a fact-finding remand to Federal District Court will be obvious.

Certificate re Grounds for Rehearing

Self represented Appellants Michael Halliwell and James Parker hereby affirm that this Petition for Rehearing is submitted not for delay, and as the most feasible way of avoiding yet more delay in the compilation of an appropriate factual record for a decision on their federal claims.

We affirm that our Petition is a good faith effort to inform the Court of controlling developments since our previous submissions, related new case law citations, and a minimum of background to tie in with our October 15, 2009 Supplemental Brief.

_____

Michael Halliwell

_____

James Parker